No. 80-1349

Office-Supreme Court, U.S.
FILED
AUG 5 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF WASHINGTON,

Petitioner,

vs.

NEIL MARTIN CHRISMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

FRED E. INBAU, ESQ.
WAYNE W. SCHMIDT, ESQ.
JAMES P. MANAK, ESQ.
Americans for Effective
Law Enforcement, Inc.
501 Grandview Drive, Suite 209
So. San Francisco, Cal. 94080
Counsel for Amicus Curiae

Of Counsel:
WILLIAM E. HORNSBY, ESQ.
33 North La Salle St.
Suite 2108
Chicago, Ill. 60602

Pandick Press Midwest, Inc. Chicago • 454-7600

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BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Ronald R. Carpenter, Prosecuting Attorney, Whitman County, Washington, Counsel for Petitioner (hereinafter referred to as "State"), and by Robert Patrick, Esq., counsel for the Respondent (hereinafter referred to as "defendant"). Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICUS

I.

GENERAL INTEREST OF AMICUS

Americans for Effective Law Enforcement, Inc. (AELE), as a citizens group, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws, its purposes are:

> 1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
>
> 2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
>
> 3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent, nationwide, the concern of the average citizen with the problems of crime and police effectiveness to deal with crime. It also provides legal research assistance in support of responsible law enforcement activities, principally through the *amicus curiae* process in the courts.

AELE has previously appeared as *amicus curiae* thirty-five times in the Supreme Court of the United States, and twenty-eight times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state

courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

II.

SPECIFIC INTEREST OF AMICUS

Our interest arises from the important constitutional and policy questions pertaining to police search and seizure activities in general, and in particular the type of activity involved in the instant case where contraband was inadvertently observed in plain view by a law enforcement officer. It is our belief that it is desirable to fully explore and discuss the legal and policy issues of interest to law enforcement agencies, and that a full airing of the issues will aid the Court in understanding the critically important law enforcement issues in this case and in putting all of them into the broadest possible perspective.

Apart from our desire to give voice to the American public's concern about crime and its consequences, we believe that it is important to express what we think are the views of the law enforcement profession as a whole, unrestricted by the needs or desires to uphold a particular decision or to sustain a particular arrest or search. This position can be assumed by an *amicus,* whereas it may not be available to a litigant.

We stress that our law-abiding citizens and the police have much at stake in this case. A decision for the defendant would be yet another signal to those who have chosen to live outside the law, that they may continue to do so, and in a flagrant manner. The implications of a decision on the legal issues will not be limited merely to college students smoking marijuana; it will apply equally to those who may choose to assemble an arsenal of weapons or explosives and raise the cry of "reasonable expectation of privacy," as if it were a shield to repell inadvertent discovery of their criminal activity by law enforcement officers.

FACTUAL AND PROCEDURAL SETTING OF THIS CASE

The facts of this case have been thoroughly presented in the State's Petition for Writ of Certiorari and will not be

repeated at length here. Briefly, college student Overdahl was stopped and detained by campus police officer Daugherty outside of a college dormitory when the officer observed that Overdahl appeared under age and was carrying a bottle of gin. Overdahl had no identification, so he and the officer proceeded to Overdahl's dormitory room to obtain identification. The door to the dormitory room was ajar. Overdahl pushed the door open and entered while Daugherty remained in the doorway. Daugherty noticed student Chrisman, the defendant, in the room and observed that he became nervous upon seeing the officer. Daugherty then noticed marijuana seeds and a pipe in plain view. He approached the contraband, inspected it, and gave both students *Miranda* warnings. He asked if there were other drugs in the room, whereupon defendant produced additional marijuana. The officer radioed for assistance and the responding officer informed the students that there would be a search and the students could either consent to the search or wait for a warrant to be secured. The students conferred with one another and signed written consent forms and were again given *Miranda* warnings. A search yielded more marijuana and LSD.

Prior to trial a suppression hearing was held and the motion was denied. Both students were then tried without a jury and convicted of felony possession of marijuana and felony possession of LSD. The convictions were appealed to the Washington State Court of Appeals, where they were upheld (24 Wash. 385, 600 P. 2d 1316 (1979)). Appeal was taken to the Washington State Supreme Court. During the interim, however, Overdahl's felony probation was dismissed and his conviction record expunged.

On November 26, 1980, the Washington State Supreme Court reversed the defendant's conviction. The State's Writ for Certiorari to this Court was then submitted and granted.

ARGUMENT

I.

CONDUCT BY A UNIVERSITY POLICE OFFICER WHO ENTERED A DORMITORY ROOM WITHOUT A WARRANT AFTER HE ALLOWED AN ARRESTEE TO ENTER THE PREMISES, REMAINED AT THE THRESHOLD OF THE DOORWAY, AND OBSERVED CONTRABAND IN PLAIN VIEW, WAS NOT UNLAWFUL

As is the custom of AELE when appearing as *amicus curiae* before this Court, we will not reiterate at any length the legal arguments made by the State in this case, although we are in complete accord with such arguments and wish to associate ourselves with and express our complete support for them. We will, however, address ourselves to the important policy questions raised by the issues in this case, and to their importance to the effectiveness of law enforcement nationwide.

"It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Harris* v. *United States,* 390 U. S. 234, 236, 88 S. Ct. 992, 993, 19 L. Ed. 2d 1067 (1968). In such circumstances the seized property does not result from a search.

In the instant case, the pertinent question is whether or not Officer Daugherty was in a position where he had a right to be when he observed the contraband. He was unquestionably in such a position, despite the confusing language in the Washington Supreme Court's written opinion, which states:

> The record is in conflict as to whether Officer Daugherty stood in the doorway and then entered the room or whether, while in the doorway, he was in fact in the room. We need not, however, let the result be determined by such niceties. The police officer was in the room at the time he observed the seeds and pipe. *State* v. *Chrisman,* 94 Wash. 2d 711, 619 P. 2d 971, 974 (1980).

In view of the uncertainty revealed in the Washington Court's opinion, *amicus* will discuss the law applicable to both of the mentioned positions.

A.

OFFICER DAUGHERTY HAD A LAWFUL RIGHT TO BE IN THE HALLWAY OR THRESHOLD OUTSIDE THE DEFENDANT'S DORMITORY ROOM, AND HIS CONDUCT WAS PROPER

At the outset it must be noted that the expectation of privacy differs for residents of single family homes from those of multiple-occupancy dwellings, such as apartment houses, rooming houses, hotels and motels. For example, various state and federal courts have held that it is not a search for police to look through motel room windows from parking lots or other public areas, *Ponce* v. *Craven,* 409 F. 2d 621 (9th Cir. 1969), *State* v. *Brown,* 9 Wash. App. 937, 515 P. 2d 1008 (1973); or for police to listen with the naked ear from outside of rooms or even from adjoining rooms, *Satterfield* v. *State,* 127 Ga. App. 528, 194 S. E. 2d 295 (1972), *United States* v. *Sin Nagh Fong,* 490 F. 2d 527 (9th Cir. 1974), *United States* v. *Fisch,* 474 F. 2d 1071 (9th Cir. 1973).

Similarly, it is consistently held that it is not a search when an officer looks into an apartment while in a common passageway or other common areas of an apartment building. 1 W. LaFave, *Search and Seizure,* § 2.3 at 307 (1978).

Furthermore, *amicus* questions the defendant's subjective expectation of privacy. When Officer Daugherty accompanied the arrestee Overdahl to the dormitory room shared with defendant, the door was not even closed, but rather was slightly ajar and Overdahl pushed it open. On this point, the court in *People* v. *Murray,* 134 Cal. Rptr. 481, 484, 64 Cal. App. 3d 343, 347 (1976) stated:

> [T]he fact is the door at bench was open, even though it was open only a few inches. The fact remains that the door was not closed shut. That fact is significant. It indicates less expectation of privacy by the occupant of the room; less likelihood of surprise upon the entrance of others such as occupants of the house . . .

As already noted, the Supreme Court of Washington determined that Officer Daugherty was inside the defendant's room at the time he observed the contraband. Prior to addressing the propriety of the officer's actions under these circumstances, *amicus* calls to the Court's attention several cases which are factually similar to the instant case, as it is *presented in the record.* We assume that had the Supreme Court of Washington recognized the fact that Officer Daugherty was at the doorway or the threshold of the room it would have held that the officer was in a position where he had a right to be and that his subsequent actions were proper.

The case most similar to the case at bar is *Winchell* v. *State,* 362 So. 2d 992 (Fla. App. 1978), where the District Court of Appeal of Florida, Third District, stated:

> Appellant's co-defendant, Roy A. Falin, was stopped by the police in North Bay Village for the purpose of inquiring as to his presence in the area and to obtain some identification. As a result of this inquiry, Falin was arrested for not having a valid driver's license. Falin, seeking to establish his identity, advised the officer that he was staying with a girl friend (appellant) in room 112 at a Holiday Inn located in North Bay Village . . .
>
> When appellant opened the door the officers saw several bags of marijuana, a scale, a pipe, and a box of sandwich bags in plain view on a dresser in the lighted room before entering it. It was not an illegal search for the officers, who had a lawful right to be where they were, to then enter the room and seize those items. 362 So. 2d 992, 993-994.

This case then provides the proper focus of whether the police were at the doorway for a legitimate purpose; if so, they were in a location or position in which they had a right to be. Certainly the legitimacy of the purpose for which Officer Daugherty was at the defendant's doorway is valid when compared to the purpose of the officers in the *Winchell* case.

A similar case, which involves an apartment complex, is that of *United States* v. *Baltazar,* 477 F. Supp. 236 (E. D. N. Y. 1979), where a police detective went to an apartment to interview an occupant.

> [A]s he stood outside the open door to the apartment he had an unobstructed view of Mr. Baltazar as the latter rose from the couch and retrieved from behind a leather bag on the coffee table a clear plastic bag containing a white powder, which bag Mr. Baltazar then secreted under his coat in the area of his left armpit... The court finds, therefore, that, as he stood in the doorway of the apartment and made the observation recited above, Det. Healy had probable cause to arrest defendant on drug charges. 477 F. 2d 236, 247-248 (1979).

Again, it is clear that the officer was in a position to make observations by virtue of a legitimate, albeit not compelling, purpose. The activities and objects within the room were unobstructed and plainly visible.

In another case, the police were investigating the welfare of an individual who was inside a house. When the defendant voluntarily opened the door at the request of the police, drug paraphernalia came into plain view of the officer. The court stated:

> If an officer is lawfully in a position which exposes contraband or evidence to plain view, the evidence may be seized without benefit of a search warrant. Merely seeing those objects which are in plain view does not constitute a search ... Because the paraphernalia on the coffee table was observed from the threshold of the doorway by the officers in plain view prior to their entry, the evidence was not obtained as a result of a search. *Rodriquez* v. *State,* 91 N. M. 700, 580 P. 2d 126, 129 (1978).

These cases have a number of critical points in common with the case at bar. First, it should be noted that the officers were found to be at doorways or thresholds; and when at those locations for legitimate reasons, each case held that the officers were in positions where they had a lawful right to be. Second, each plain view observation was truly inadvertent. The officers were not investigating the conduct of inhabitants for the purpose of making the arrests which ultimately followed the seizures; nor were they seeking the evidence or contraband which appeared before them in plain view when the doors were opened to them.

B.

OFFICER DAUGHERTY HAD A LAWFUL RIGHT TO BE IN THE DEFENDANT'S DORMITORY ROOM, AND HIS CONDUCT WAS PROPER

Overdahl was a resident of the dormitory room shared with the defendant. Officer Daugherty arrested Overdahl outside the dormitory and when Overdahl was unable to produce an identification, Daugherty accompanied Overdahl to the dormitory room to obtain his identification. The issue then becomes an officer's right to accompany an arrestee during post-arrest movements before booking for the arrest. The most common fact-pattern of post-arrest movement involves an arrest at the arrestee's premises and the need to secure proper clothing before departing the residence. The arrestee may initiate the request for clothing, *United States* v. *Mason,* 523 F. 2d 1122 (D. C. Cir. 1975), *Moffett* v. *State,* 291 Ala. 382, 281 So. 2d 630 (1973), *People* v. *Green,* 14 Ill. App. 3d 972, 304 N. E. 2d 32 (1973); or the *police* may require the arrestee to obtain the appropriate attire, *Giacalone* v. *Lucus,* 445 F. 2d 1238 (6th Cir. 1971), *Walker* v. *United States,* 318 A. 2d 290 (D. C. App. 1974). Such instances often require movement of the arrestee from one room to another, accompanied by the arresting officer. The courts have consistently held that the

inadvertent discovery of evidence in plain view during such movements is admissible. 2 W. LaFave, *Search and Seizure*, § 6.4 at 421 (1978).

Furthermore, cases have held that where the arrestee requests clothing from a closet or drawer, the police are allowed to examine those interior areas. *Walker* v. *United States, supra* and *Giacalone* v. *Lucus, supra.* Other courts have gone further, holding that the police may obtain the clothing, *United States* v. *Mulligan*, 488 F. 2d 732 (9th Cir. 1973). A step beyond this are those cases which hold that an arrestee may be detained in one place on the premises by an officer, while another officer searches for and retrieves the clothing. *United States* v. *Titus*, 445 F. 2d 577 (2nd Cir. 1971) and *Pittman* v. *United States*, 375 A. 2d 16 (D. C. App. 1977).

Commenting on these activities, LaFave states (*supra* p. 421):

> None of these practices seems inherently unreasonable, and thus it is not surprising that they have all been upheld by the courts. Where the police have done no more than accompany the defendant to another part of the premises, resulting in their observation of evidence, it need only be determined that the police were lawfully present where they made the observation. Courts have readily accepted the proposition that to prevent escape and for self-protection it is lawful to so accompany the arrestee... Given the propriety of accompanying the defendant and searching these areas, it has been assumed to be of no legal significance that the police made essentially the same intrusion by undertaking to secure clothing for the defendant.

The dissenting Washington Supreme Court Justice in the instant case has noted two additional cases in his analysis of this point, 94 Wash. 2d 711, 619 P. 2d 971, 976 (1980). In one, *People* v. *Mann*, 61 Misc. 2d 107, 113, 305 N. Y. S. 2d 226 (1969), the court held that it was " 'certainly reasonable' for

police to accompany defendant to a bedroom and 'keep him under continuous surveillance while he was putting on his clothing.' "

In the other case, which goes to the heart of the need to accompany a defendant under such circumstances, *United States* v. *DiStefano,* 555 F. 2d 1094 (2nd Cir. 1977), the court stated that an officer could accompany a defendant from one room to another "to maintain a 'watchful eye' on her and to assure that she did not destroy evidence or procure a weapon."

It is clear that once inside an arrestee's premises it is permissible for an officer to move from one area to another to keep the defendant under observation. On this point, the dissenter in the Supreme Court of Washington aptly states, "If Officer Daugherty had the right to search defendant's room, he obviously had a right to enter it." 94 Wash. 2d 711, 619 P. 2d 971, 976 (1980).

Amicus readily admits that there is a difference between the foregoing cases and the instant one, in that the defendants in those cases were arrested in one area of their premises and the subsequent seizures were at different locations, whereas in the instant case, the arrestee Overdahl was arrested outside of his premises and the seizure was subsequently made within the room. Other cases readily support the propriety of the latter actions, however.

In *State* v. *Sanders,* 374 So. 2d 1186 (La. 1979), the defendant was arrested at his door when officers covertly arranged to buy drugs from him. The officers were outside the door, with the defendant inside and nude. The court reported the facts as these:

> Sanders asked them if he could get his clothes. The officers consented and entered the one-room apartment with Sanders where they seized the marijuana near the door. In the room they saw a hypodermic syringe loaded with reddish liquid lying on the floor. A jar top, a piece of tin foil and a candle were nearby, which they believed

> were used to cook down preludin prior to injection. They also seized this paraphernalia and advised Sanders he would be booked for possession of preludin. 374 So. 2d 1186, 1188 (1979).

On the propriety of the plain view seizure of the preludin, the court stated:

> Once Sanders was arrested for his first offense and placed under arrest he allowed the police to enter his apartment while he donned his clothes. It was then that they saw the preludin in plain view.
>
> Evidence or contraband in plain view which the police discover inadvertently, when they are in a position where they have a right to be, can be seized and introduced in evidence . . .
>
> Insofar as the seizure of the preludin and its paraphernalia is concerned, the officers entered the apartment after arresting Sanders so they could keep him in sight and maintain him in custody. It was their right to protect themselves against the possibility that he might obtain a weapon or that his clothes may contain such. Accordingly, Sanders' clothes were inspected as he dressed. 374 So. 2d 1186, 1188-1189 (1979).

Clearly the facts of *Sanders* are similar to those of the instant case in that the arrest was not made inside the dwelling, the officers entered the premises for the purpose of keeping the arrestee in sight and made a subsequent plain view observation of contraband. Under these circumstances, the Supreme Court of Louisiana did not hesitate to hold that the officers had a right to be in the premises.

We ask the Court to note also that in *Sanders* the officers had information that the defendant was selling drugs from his home, but obtained neither an arrest nor search warrant. This is a significant contrast to the instant case, where Officer Daugherty's plain view observations were truly inadvertent.

Another case, which is properly noted by the dissenting opinion, takes the issue of officers entering premises and making subsequent plain view discoveries to the precise level of the instant case. In *State* v. *Brown*, 132 N. J. Super. 180, 333 A. 2d 264 (1975), the defendant was arrested in his car for possession of cocaine. He requested permission to go to his motel room to obtain a jacket and was accompanied by the police. Upon entering the room, the officers observed a bottle containing a white powder. On the issue of the propriety of the seizure and the officers' right to enter the room, the court stated:

> There is no merit to defendant's contention that the seizure of the Excedrin bottle in his room was unlawful. The police, for their personal safety and to prevent an escape, were justified in escorting defendant to his room to get his jacket when he requested it. The police, therefore, had a right to be in his room, and when they inadvertently saw the Excedrin bottle in plain view they had probable cause to suspect its contents and, therefore, lawfully confiscated it. 132 N. J. Super. 180, 333 A. 2d 264, 266 (1975).

While the foregoing cases address the issue of being on the premises to retrieve clothing, whereas the instant case involves entry onto the premises to secure an identification, *amicus* submits that this is a difference without a distinction. The real issue, as noted in the cases, is the need of the officer to keep an arrestee under observation during post-arrest movements to guard against escape attempts, prevent destruction of evidence, and secure the personal safety of the police in the event the arrestee attempts to obtain and use a weapon.

In the case at bar, *amicus* acknowledges that the opportunity of an escape attempt from the dormitory room was remote, and the possibility of destroying the alcoholic beverage for which Overdahl was arrested was virtually non-existent. However, *amicus* submits that Officer Daugherty had a right to keep Overdahl under his observation for the purpose of securing his own safety. Pursuant to that purpose, the officer had a right to be in the room while Overdahl was locating his identification.

The need for police officers to carry out their duties without unduly jeopardizing their personal safety cannot be overemphasized. There can be no question that officers are frequently injured or killed in situations which initially presented no apparent danger. The need for caution is great in almost all arrests. For example, in 1978, there were more than 56,000 assaults on law enforcement officers. During the ten year period 1969-1978, 1,123 officers were slain in the line of duty. Of the 93 officers killed in 1978, 15 were enforcing traffic laws, eight were investigating suspicious persons or circumstances, and seven were transporting or otherwise engaged in the custody of prisoners.

Furthermore, according to the FBI Uniform Crime Reports,

> Ninety-one (98 per cent) of the law enforcement officers killed in 1978 were slain with firearms. Handguns were used in 67 of these deaths, rifles in 13, and shotguns were used to kill 11 of the officers. Fourteen officers were slain with their own firearms. Of the 2 officers not slain with firearms, 1 was killed with a blunt instrument and 1 with personal weapons (hands, fists, feet) ... It cannot be stated that any one day of the week is more hazardous to a law enforcement officer than any other. However, more officers are slain during the nighttime hours, especially between 9:00 p.m. and 3:00 a.m. From 1969-1978, 43 per cent (484) of the 1,123 officers who lost their lives in the line of duty were killed during the aforementioned 6-hour period. 1978 FBI Uniform Crime Reports, *Crime in the United States,* U. S. Department of Justice (1979).

Clearly, from the police officer's perspective and experience, tragedy can strike under the most routine circumstances. As an officer strives to serve and protect the public, he must also be protective of his personal safety and take those steps which serve to minimize the ever-present danger. Applying these principles to the case at bar, Officer Daugherty accompanied Overdahl to his dormitory room after Overdahl had been arrested. Admittedly, the arrest was for a minor

infraction and not in itself cause for the officer to be unduly concerned. But once reaching the room, the officer encountered the defendant, Overdahl's roommate. Daugherty knew nothing of the character of the defendant, only that he was visibly nervous upon seeing the officer at the doorway. In retrospect, we know that the defendant was agitated because of the possibility of discovery of drugs in the room. But Daugherty did not know that until he viewed the seeds and pipe. He had no reason to know why the defendant was agitated, but he did know that such a reaction was good reason to be on guard. Continual observation of the occupants of the room, under these circumstances, was highly appropriate to insure the officer's own safety. Under this rationale, Officer Daugherty had a right to be in the dormitory room, observing the movements of Overdahl and defendant.

C.

EXIGENT CIRCUMSTANCES EXISTED TO SEIZE CONTRABAND OBSERVED BY A POLICE OFFICER IN PLAIN VIEW IN A DORMITORY ROOM, WHEN THE OFFICER WAS ACCOMPANYING AN OCCUPANT PLACED UNDER ARREST

Amicus respectfully submits that Officer Daugherty's conduct in seizing the marijuana seeds which were in plain view was proper and that exigent circumstances prevented the procurement of a search warrant. It is well established that exigent circumstances exist if contraband is threatened with removal or destruction. *Johnson* v. *United States,* 333 U. S. 10, 68 S. Ct. 367, 92 L. Ed. 436 (1948). Furthermore, the determination of whether the exigencies of a situation are sufficient to allow a warrantless search depends upon the totality of the circumstances. *United States* v. *Evans,* 481 F. 2d 990, 993 (9th Cir. 1973).

It takes little or no imagination to picture the scenario of rapid events if Officer Daugherty had left the dormitory room to secure a search warrant for drugs after his inadvertent plain view observation. It would have followed closely the script pictured by a trial court and quoted in *State* v. *Mollberg,* 246 N. W. 2d 463, 469 (Minn. 1976):

> It does not take much imagination to predict that had the officers picked up the evidence in plain sight and then returned to get a search warrant for further marijuana, or other controlled substances or paraphernalia, they would not have found much upon their return to the premises in question.

II.

ASSUMING, ARGUENDO, THAT THE CONDUCT OF THE OFFICER WAS THE RESULT OF AN IMPROPER SEARCH, IT WAS CONDUCTED IN A REASONABLE, GOOD-FAITH BELIEF THAT IT WAS PROPER, AND THE CONTRABAND SHOULD NOT BE EXCLUDED AS EVIDENCE

The exclusionary rule does not prevail in all aspects of criminal procedure. For example, it does not extend to grand jury proceedings, *United States* v. *Calandra,* 414 U. S. 338, 347, 94 S. Ct. 613, 619, 38 L. Ed. 2d 561 (1974), nor does the rule require exclusion of evidence for impeachment purposes, *Walder* v. *United States,* 347 U. S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954). The rationale for such decisions has been to strike a balance between a defendant's rights under the Fourth Amendment and the public's interest "in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States,* 394 U. S. 165, 174-175, 89 S. Ct. 961, 967, 22 L. Ed. 2d 176 (1969).

More recently the concept that a police officer's good-faith belief that his conduct was proper has been held to bar the application of the exclusionary rule to the evidence.

In *United States* v. *Williams*, 622 F. 2d 830 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 946 (1981), the Fifth Circuit Court of Appeals, sitting *en banc*, stated:

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the Exclusionary Rule to the evidence. 622 F. 2d 830, 846-7 (5th Cir. 1980)

This exception to the exclusionary rule is not broad-based, but rather strictly limited. The *Williams* Court noted that the officer's subjective belief concerning the legality of a search is not enough. Ignorance of the basic principles of criminal procedure would obviously not constitute good faith. The police officer's actions must be "based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe he was acting lawfully." 622 F. 2d 830, 847.

The *Williams* Court addressed the by now widely recognized gross inability of the rule to effectively serve its initial purpose of deterring police misconduct in certain limited situations when it stated, "It makes no sense to speak of deterring police officers who acted in the good-faith belief that their conduct was legal by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all." 622 F. 2d 830, 842. The court further eloquently articulated the need to apply the rule only when that application can serve its originally intended purpose, when it stated:

> For here the cost of applying the rule is one paid in coin minted from the very core of our fact finding process, the cost of holding trials at which the truth is deliberately and knowingly suppressed and witnesses, in contravention of their oaths, are forbidden to tell the whole truth, censured if they do. This is a high price indeed and one that ought never be paid where, in reason, no deterrence is called for and none can in fact be had. Such a continued wooden

> application of the rule beyond its proper ambit to situations that its purposes cannot serve bids fair to destroy the rule entirely in the long run. 622 F. 2d 830, 847.

Prior to the *Williams* decision, this Court recognized that the deterrent effect of police misconduct intended by the rule is significantly diminished when the officer acts under a valid good-faith belief that his actions are proper. In *Michigan* v. *Tucker,* 417 U. S. 433, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974), the Court stated:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a great degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

In a concurring opinion in *Brown* v. *Illinois,* 422 U. S. 590, 612, 95 S. Ct. 2254, 2266, 45 L. Ed. 2d 416 (1975), Mr. Justice Powell commented on *Michigan* v. *Tucker,* thusly: "In cases in which this underlying premise is lacking, the deterrence rationale of the exclusionary rule does not obtain, and I can see no legitimate justification for depriving the prosecution of reliable and probative evidence."

Since the Fifth Circuit Court of Appeal's opinion in *Williams,* state courts are rapidly beginning to look beyond alleged police misconduct to determine whether such misconduct was flagrant and purposeful, in which case the rule would apply as it was intended; or whether the misconduct was carried out under a genuine objective good-faith belief that the officer's conduct was consistent with lawful enforcement procedures, in which case the evidence would properly be admitted to assist in the determination of the guilt or innocence of the accused.

People v. *Pierce*, 88 Ill. App. 3d 1095, 44 Ill. Dec. 326, 411 N. E. 2d 295, 301 (1980), is one such state case. There the court stated, "... the purpose and flagrancy of the police misconduct is premier in any analysis, ..." The court then considered the totality of circumstances, found that the police intrusion was minimal and not conscious or flagrant, and held that the "reasonable and good-faith belief" exception to the exclusionary rule fashioned by the *Williams* Court would apply.

The most recent state to adopt the good-faith exception is New York, where, in *People* v. *Adams*, ___ N. Y. 2d ___, ___ N. E. 2d ___, 29 Cr L 2173 (1981), the New York Court of Appeals applied the good-faith exception to a consent to search situation where the consenting party was not a lawful resident of the premises searched by the police.

On the applicability of the rule to this specific situation, the New York Court of Appeals stated:

> A further, although somewhat related, consideration behind this line of reasoning involves the very purpose of the exclusionary rule ... Because the exclusionary rule is primarily aimed at deterring police misconduct, these courts have recognized that its purpose would not be furthered by applying it in instances where the police, believing that they are acting lawfully, engage in a search which later turns out to be "unlawful" because, in hindsight, their reasonable reliance on the consenting person's authority proves to be erroneous. *Adams*, ___ N. Y. 2d ___, ___ N. E. 2d ___, 29 Cr L at 2173.

The court also considered the environment in which law enforcement officers perform their duties when it stated:

> Detached from the tension and drama of the moment, it is sometimes easy for an appellate court to lose sight of the fact that it is the reasonableness of police action which is the linchpin to analysis of any case arising under the Fourth Amendment. When judged in accordance with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act (*Brinegar* v. *U. S.*, 388 U. S. 160, 197)," the police conduct of securing the rifle and ammunition in the

> defendant's closet was a reasonable response to the situation in which they found themselves and, therefore, was not proscribed by the exclusionary rule. *Adams,* ____ N. Y. 2d ____, ____ N. E. 2d ____, 29 CrL at 2174.

Even the state legislatures are likely to adopt this theme of looking at police conduct in the search and seizure area according to its reasonableness, focusing on the good faith of police officers. Recently the State of Colorado became the first state to adopt a good faith exception to the exclusionary rule by statute (Colo. Rev. Stat. 16-3-308, signed by Governor Dick Lamm on June 5, 1981 and taking effect July 1, 1981). The legislation was sponsored by 33 representatives and 7 senators in the Colorado legislature, and according to its draftsman, Denver District Attorney Dale Tooley, speedy judicial review of the new statutory exception to the exclusionary rule will be sought. It can certainly be expected that other states will follow the Colorado example.

While the cases noted above are not factually similar to the case at bar, *amicus* submits that the rationale of those holdings is directly applicable. There can be no assertion that Officer Daugherty acted with malice. Any intrusion he made into the defendant's room was for a legitimate purpose and done in the least possible obtrusive manner. The defendant's expectation of privacy was obviously not great when contraband was allowed to sit in plain view and the door to his room was not closed shut. But of paramount concern to *amicus* is the present uncertainty of the law under such circumstances. Did the officer have a right to keep an arrestee under continuous observation during necessary post-arrest movements? Even if Officer Daugherty had been an attorney, even if he had been a legal scholar of the Fourth Amendment, he could not have made a better decision; simply because there is no clear indication in the cases on these precise issues.

Assuming, arguendo, that Officer Daugherty's actions resulted in technical error of the most strained and refined sort, *amicus* respectfully submits that he acted with an objective, reasonable and good-faith belief that his actions were proper under the circumstances; and as a result of these actions, there is no sound basis for exclusion of the evidence. To apply the exclusionary rule in such a case would serve no deterrent purpose, but rather only to detract from a determination of guilt or innocence of the defendant. It would further place beyond the pale the elusive search for truth that has all but deserted our trial courts through the years that they have been burdened with this unfortunate, ill-conceived judge-made rule. The time to bring this chaotic chapter in our jurisprudence to a charitable close is here.

CONCLUSION

Amicus respectfully submits that the decision of the Supreme Court of the State of Washington should be reversed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

FRED E. INBAU, ESQ.
WAYNE W. SCHMIDT, ESQ.
JAMES P. MANAK, ESQ.
Americans for Effective
Law Enforcement, Inc.
501 Grandview Drive, Suite 209
So. San Francisco, Cal. 94080
Counsel for Amicus Curiae

Of Counsel:
WILLIAM E. HORNSBY, ESQ.
33 North La Salle St.
Suite 2108
Chicago, Ill. 60602